

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2000 OAL Determination No. 14

July 28, 2000

Requested by: CALIFORNIA STATE EMPLOYEES ASSOCIATION

Concerning: STATE COMPENSATION INSURANCE FUND rules (1) requiring employees to provide a reason for absence on attendance report form and (2) interpreting “reason for absence” to mean “the exact nature of an illness”

**Determination issued pursuant to Government Code Section 11340.5;
Title 1, California Code of Regulations, Chapter 1, Article 3**

ISSUE

Do policies utilized by the State Compensation Insurance Fund requiring employees to provide a reason for their absences and interpreting the term “reason for absence” constitute “regulations” as defined in Government Code section 11342, subdivision (g), which are required to be adopted pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with section 11340), Division 3, Title 2, Government Code; hereafter, “APA”)?¹

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1. This request for determination was filed by the California State Employees Association (Judith Serlin, Labor Relations Representative), 3055 Wilshire Blvd., Los Angeles, CA 90010, (213) 387-1744. The State Compensation Insurance Fund’s response was filed by Robert W. Daneri, Assistant Chief Counsel, 1275 Market Street, San Francisco, CA 94103-1410, (415) 565-1248. This request was given a file number of 99-016. This determination may be cited as “**2000 OAL Determination No. 14.**”

CONCLUSION

The above-referenced policies or rules are not subject to the APA because the State Compensation Insurance Fund is exempt therefrom pursuant to Insurance Code section 11873.

ANALYSIS

A determination of whether the two State Compensation Insurance Fund (“SCIF”) rules are “regulations” subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the board, (2) whether the challenged standards contain “regulations” within the meaning of Government Code section 11342, subdivision (g) and (3) whether those challenged standards fall within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Government Code sections 11342, subdivision (a); 11346.) In this connection, the term “state agency” includes, for purposes applicable to the APA, “every state office, officer, department, division, bureau, board, and commission.” (Government Code section 11000.) For reasons which will become apparent below, SCIF has been termed a “state agency,” but with a “special and unique character.” (*Burum v. State Compensation Insurance Fund* (1947) 30 Cal.2d 575, 586, 184 P.2d 505.)

In response to this regulatory challenge, SCIF takes the position that it is exempt from the APA based on Insurance Code section 11873.² This section states as follows:

- “(a) Except as provided by subdivision (b), [SCIF] shall not be subject to the provisions of the Government Code made applicable to state agencies generally or collectively, unless the section specifically names [SCIF] as an agency to which the provision applies.

2 . Response to Request for Determination, pp. 1 - 2.

- “(b) [SCIF] shall be subject to the provisions of Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of, and Division 5 (commencing with Section 18000) of Title 2 of, the Government Code, with the exception of all of the following:
- (1) Article 1 (commencing with Section 19820) and Article 2 (commencing with Section 19823) of chapter 2 of Part 2.6 of Division 5 of Title 2 of the Government Code.
 - (2) Sections 19849.2, 19849.3, 19849.4, and 19849.5 of the Government Code.
 - (3) Chapter 4.5 (commencing with Section 19993.1) of Part 2.6 of Division 5 of Title 2 of the Government Code.”

With respect to exemptions from the APA, Government Code section 11346 provides in part as follows:

“[T]he provisions of [the APA] are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in [the APA] repeals or diminishes additional requirements imposed by any statute. *[The APA] shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.*” [Emphasis added.]

Thus, the question OAL must address is whether section 11873 of the Insurance Code is “subsequent legislation” within the meaning of Section 11346 and, if so, whether Insurance Code section 11873 provides SCIF with a legally valid *express* statutory exemption from the APA.

First, with regard to the timing of the enactment of the statutes in question, Insurance Code section 11873 became operative on January 1, 1980. (Stats. 1979, c. 738, section 15.) Although Government Code section 11346 did not become operative until July 1, 1980 (Stats. 1979, c. 567, section 1; AB 1111), it is essentially a renumbered version of section 11420 of the Government Code. (See *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 59, 3 Cal.Rptr.2d 264, 272 (“section 11420 . . . [was] the identical predecessor to the present Government Code section 11346”).) Section 11420 was enacted in 1947. (Stats. 1947, Ch. 1425 § 11, p. 2988.) Therefore, the starting point for measuring “subsequent”

legislation is 1947, not 1979 or 1980. This was emphasized in *Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 909, 54 Cal.Rptr.2d 225. There, the court noted as follows:

“ . . . Originally enacted in 1947, what is now section 11346 of the Government Code read in relevant part . . . as follows:

‘ . . . The provisions of [the APA] shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly.’

“Thus, another statute will supplant or limit the APA when two conditions are met. *One, the other statute directing that the APA be supplanted or limited must have been enacted after 1947.* (*Engelmann v. State Bd. of Education* (1991) 2 Cal.App.4th 47, 59, 3 Cal.Rptr.2d 264.) Two, the other statute must disclose an express intention to supplant or limit the APA.” [Emphasis added.] [Citation omitted.]

Thus, Insurance Code section 11873 was enacted after 1947 and, consequently, constitutes “subsequent legislation” within the meaning of Government Code Section 11346.

With respect to the nature of the exemption stated in Insurance Code section 11873, in 1918, an amendment to the California State Constitution was passed which authorized the Legislature to “create, and enforce a complete system of [worker’s] compensation.” (California Constitution, Article XIV, section 4.) The Legislature responded by creating SCIF. (See *State Compensation Ins. Fund v. McConnell* (1956) 46 Cal.2d 330, 337, 294 P.2d 440.) SCIF was intended to be “‘fairly competitive with other insurers’ and to be ‘neither more nor less than self-supporting.’” (*Courtesy Ambulance Service of San Bernardino v. Superior Court* (1992) 8 Cal.App.4th 1504, 1511, 11 Cal.Rptr.2d 161, 163, citing Insurance Code section 11775.) SCIF had a number of unique characteristics. For example, it was exempted from the requirements for open meetings (Government Code sections 11120 – 11132; Insurance Code section 11770.5) and the Public Records Act (Government Code sections 6250 – 6270; Insurance Code section 11770.5). Persons or entities seeking payment on their SCIF policies did not have to follow state claims procedures. SCIF also had to pay taxes on the same basis as private insurance companies. (See *Courtesy Ambulance Service of San Bernardino v. Superior Court*, 8 Cal.App.4th at 1511 - 12, 11 Cal.Rptr.2d at 163 – 164.)

In 1979, legislation was enacted which increased SCIF's autonomy. One of the provisions of this legislation became codified as Insurance Code section 11873. Regarding this provision, the report of the Assembly Finance, Insurance, and Commerce Committee stated as follows:

“Section 15 of the bill . . . would exempt the Fund from all provisions of the Government Code except civil service matters unless the Fund is made specifically subject to particular Government Code sections. *Since the purpose of this and earlier legislation is to make the State Fund as much like a private insurance company as possible, it is felt that many provisions of the Government Code ought not to be applicable to the Fund. . . .* Without such an exemption as proposed by Section 15 of the bill, the Fund is concerned that it will have constantly to seek amendments to legislation so as to avoid its becoming unnecessarily subject to certain provisions of the Government Code.” (Report of the Assembly Finance, Insurance, and Commerce Committee, *AB 616 – Ellis*, May 2, 1979, p. 2 [Emphasis added].)

Legislative Counsel's summary of the bill reflected these same goals. It stated in part as follows:

“The bill . . . would specifically exempt the fund from specified provisions of the Government Code applicable to state agencies generally, with specified exceptions.” (AB 616. See also *Courtesy Ambulance Service of San Bernardino v. Superior Court*, 8 Cal.App.4th at 1516, 11 Cal.Rptr.2d at 166 (“It is . . . reasonable to assume that the legislative desire was to complete the process of ‘deregulation,’ . . .”).)

Yet to be legally tested was the question of whether this exemption from the Government Code was absolute. This question was answered by the Court of Appeal in *Courtesy Ambulance Service of San Bernardino v. Superior Court* (1992) 8 Cal.App.4th 1504, 11 Cal.Rptr.2d 161. Faced with the prospect of being subjected to liability for punitive damages, SCIF took the paradoxical position that the exemption provided by section 11873 was *not* absolute. SCIF obviously was seeking the protection of the Tort Claims Act. (Government Code section 810 et seq.) The plaintiff, however, argued that section 11873 deprived SCIF of this statutory immunity. (8 Cal.App.4th at 1509 - 10, 11 Cal.Rptr.2d at 162.)

The Court of Appeal agreed with the plaintiff. It held that immunity from punitive damages was no longer available to SCIF because of Insurance Code section 11873. (8 Cal.App.4th at 1519.) In reaching this conclusion, the court made a number of cogent observations concerning the statutory exemption found in section 11873. It noted that SCIF had strongly advocated passage of this Legislation because it “wished to be treated like a private company.” (*Id.* at 1517.) The court went on to observe the following:

“The 1979 amendments . . . freed SCIF from regulation; insofar as the addition of section 11873 also eliminated the protection of [government tort claim immunity], it is similarly consistent with the understanding that SCIF operates in a proprietary manner and is not entitled to the protection given to the government.” (*Id.* at 1516. See also *Maxon Industries, Inc. v. State Compensation Insurance Fund* (1993) 16 Cal.App.4th 1387, 1392, 20 Cal.Rptr.2d 730, 732 (“It is apparent that the Fund sought to cast itself as a private enterprise rather than a public entity when it sponsored the 1979 legislation. It should be treated that way, receiving both the benefits and the disadvantages of that status.”))

In answering the question of whether the exemption afforded by section 11873 included no exceptions other than those specifically mentioned, the court noted as follows:

“The statute states that ‘the fund shall not be subject to the provisions of the Government Code made applicable to state agencies generally or collectively, unless the section specifically names the fund as an agency to which the provision applies.’ The statute lists certain specific statutory exceptions from its application, among which is not [immunity from punitive damages]. As the maxim states, *inclusio unius est exclusio alterius*. We are not authorized to *add exceptions* where the Legislature has spoken clearly to prescribe a rule and narrowly limit the exceptions thereto.” (*Id.* at 1514. [Emphasis added].)

The implication of the Court’s holding is that unless some provision of the Government Code is specifically excepted from section 11873, SCIF is exempted from it. That would include the APA.

In *Courtesy Ambulance*, however, the argument was made that section 11873 had repealed by *implication* the application of the Government Code to SCIF. Since, according to SCIF, repeals by implication were disfavored, the Court presumably

should have found that all of the provisions of the Government Code still applied. These provisions, of course, included tort claim immunity protection.

The Court of Appeal again disagreed with SCIF. It noted the following:

“SCIF’s argument that we should not hold that section 11873 repealed Government Code section 818 [immunity from punitive damages] by implication is without merit. Agreed, that repeals by implication are disfavored [Citation] and that such a construction must rest upon an *express declaration* or other firm evidence. [Citation.] But the argument is inapposite: ***the obvious, express intent of section 11873 is to repeal those sections of the Government Code not excepted, insofar as they affected SCIF. Our holding has nothing to do with repeal by implication; the repeal is explicit on the face of the statute.***” (*Id.* at 1518 [Emphasis in original in italics.] [Emphasis added in bold italics.] See 8 Cal.App.4th at 1512 (court referred to the 1979 legislation as an “express exemption”); *Tricor California, Inc. v. State Compensation Insurance Fund* (1994) 30 Cal.App.4th 230, 241, 35 Cal.Rptr.2d 550, 556 (citing language in *Courtesy Ambulance*). See also 2A Sutherland, *Statutory Construction* (West Group 2000) § 47:23 at 317 (“The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded.” [Footnote omitted.])).

Courtesy Ambulance thus held that Insurance Code section 11873 exempts SCIF from *every provision of the Government Code* not otherwise excepted and that this was an *express statutory exemption*. The APA is part of the Government Code and was not otherwise excepted in section 11873. Therefore, section 11873 expressly exempts SCIF from the APA.

For all of the above reasons, the two challenged rules of SCIF are not subject to the APA because SCIF is exempt therefrom pursuant to Insurance Code section 11873.

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